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JUN - 4 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

June 4, 1997

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Opposition to Petition for Partial Reconsideration
CC Docket No. 92-297

Dear Mr. Caton:

On behalf of CellularVision USA, Inc. ("CVUS"), and pursuant to Section 1.429 of the Commission's Rules, enclosed please find an original and eleven (11) copies of its Opposition to Petition for Partial Reconsideration Filed by Sierra Digital Communications, Inc., in the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner
Counsel for CVUS

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

JUN - 4 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Rulemaking to Amend Parts 1, 2, 21)
and 25 of the Commission's Rules to)
Redesignate the 27.5-29.5 GHz)
Frequency Band, to Reallocate the)
29.5-30.0 GHz Frequency Band, to)
Establish Rules and Policies for Local)
Multipoint Distribution Service and for)
Fixed Satellite Services)

CC Docket No. 92-297

**OPPOSITION OF CELLULARVISION USA, INC. TO PETITION FOR PARTIAL
RECONSIDERATION FILED BY SIERRA DIGITAL COMMUNICATIONS, INC.**

CellularVision USA, Inc.¹ ("CVUS") by its attorneys and pursuant to Section 1.429(f) of the Commission's Rules (47 C.F.R. §1.429(f)), hereby files its opposition to the Petition for Partial Reconsideration filed May 5, 1997 by Sierra Digital Communications, Inc. ("Sierra Digital Petition") in the above-referenced rulemaking proceeding.

As the twice-recognized pioneer of LMDS technology by the FCC² and as active

¹ CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS."

² See *Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration* ("First NPRM"), 8 FCC Rcd 557 (1993); *Third Notice of Proposed Rulemaking and Supplemental Tentative Decision* ("Third NPRM"), 11 FCC Rcd 53 (1995).

participants in the Commission's *Fourth NPRM*,³ CVUS has provided a leadership role in developing the comprehensive technological and substantive record that led the Commission's well-reasoned sharing plan for the 31.0-31.3 GHz band ultimately adopted in its *Second Report and Order*.⁴ In view of the thorough record established in this proceeding, as reflected by the Commission's dedication of 91 separate paragraphs in its *Second Report and Order* to the specific 31 GHz spectrum sharing issue, Sierra Digital's request to have the compromise band plan reconsidered is unsound and not well reasoned since Sierra Digital fails to allege any new or compelling facts, arguments or policy not already considered by the Commission. Accordingly, Sierra Digital's request to reallocate 150 MHz of the 300 MHz exclusively for potential future point-to-point use should be denied.

I. The Commission's 31 GHz Band Plan Reflected a Reasoned Compromise That Carefully and Correctly Weighed All Attendant Public Interest Factors

Contrary to Sierra Digital's assertions, the Commission's 31 GHz band segmentation plan was a well-crafted compromise that carefully and correctly

³ See *First Report and Order and Fourth Notice of Proposed Rulemaking*, CC Docket No. 92-297, released July 22, 1996 ("*First Report & Order*" or "*Fourth NPRM*").

⁴ See *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, released March 13, 1997 ("*Second Report & Order*").

weighed all attendant public interest factors.⁵ As the Commission noted, “[t]he public interest underlies any decision we make in allocating spectrum.”⁶ In reaching its compromise decision, the Commission adopted a sharing plan “based on the features of both the plans submitted by CellularVision and Sierra.”⁷ In so doing, the Commission complied with Sierra Digital’s request to consider the public interest benefits of point-to-point 31 GHz users, notwithstanding the fact that these licensees were clearly licensed *without* any legal protection from co-user interference.⁸ Thus, despite the fact that the incumbent 31 GHz point-to-point licensees had no legitimate expectation of protection from present or future 31 GHz licensees, the Commission acknowledged the public importance of the current 31 GHz licensees by granting all incumbents throughout the 300 MHz the *absolute right* — where none previously existed — to receive interference protection from LMDS licensees.⁹

Despite the Commission’s decision to protect incumbents to the fullest extent

⁵ See *id.*, ¶¶79-90 (summarizing band segmentation plan and incumbent protection).

⁶ *Id.*, ¶67.

⁷ *Id.*, ¶79.

⁸ See *id.* ¶64 (citing its 1985 *Spectrum Utilization Second Report and Order* and noting that “[our goal was to provide for reduced licensing and coordination requirements for service providers utilizing the band, giving each licensee equal access and *no rights to object to harmful interference being caused by any other licensed operation.*”(emphasis added)).

⁹ See *id.*, ¶¶67, 80. Incumbents in the middle 150 MHz will be afforded to opportunity to move to the outer 75 MHz bands to receive full interference protection. *Id.*, ¶¶91-91.

possible by preserving their existing operations, Sierra Digital claims that the public interest “will be better served” if the Commission abandons its band segmentation compromise and instead allocates 150 MHz from the outer bands of the 31 GHz for exclusive point-to-point use.¹⁰ This request is no different from Sierra Digital’s initial proposal in the *Fourth NPRM* and again should be rejected.¹¹

As Sierra Digital is well aware, the Commission has a “responsibility to revisit spectrum use to determine whether it is being put to the most efficient and effective use in the public interest.”¹² Moreover, with regard to current 31 GHz point-to-point use, Sierra Digital does not dispute the Commission’s revised figures for current licensees — 86 in all, approximately 19 of whom utilize the technology for traffic control in seven states.¹³ Nonetheless, despite these paltry numbers, Sierra Digital disputes the Commission’s conclusion that “based on an assessment of the nationwide availability of the spectrum, it is apparent that the number of entities operating under the existing rules for 31 GHz services is small and the locations are very few and confined.”¹⁴ According to Sierra Digital, the Commission failed to consider the “realities” of potential future point-to-point use when making this

¹⁰ Sierra Digital Petition, p. 4.

¹¹ See *Second Report & Order*, ¶76 (summarizing Sierra Digital and Sunnyvale’s Comments and Reply Comments to the *Fourth NPRM*.).

¹² *Id.*, ¶55.

¹³ See *id.*, ¶¶46, 56.

¹⁴ *Id.*, ¶56.

conclusion.¹⁵ This claim remains unsupported in the record.

In fact, in weighing the potential for point-to-point expansion, the Commission first reviewed the performance of existing point-to-point services. Despite Sierra Digital's contention that applicable 31 GHz equipment is only recently becoming affordable, the Commission correctly concluded that "in comparison with the technology and demand for the kinds of services in LMDS, the extent to which the incumbent 31 GHz services have used this nationwide spectrum over the past 12 years in which it has been available is minimal."¹⁶ Moreover, the Commission noted that both the Nevada DOT and USDOT indicated that traffic control systems are being developed for a *variety* of bands and the technology is improving or *changing rapidly*."¹⁷ The Commission also appropriately concluded that expansion of the 31 GHz services, if at all, "would likely have a chilling effect on the efforts of LMDS providers to establish and expand their services in response to consumer demand, seriously jeopardizing our objectives in designating the band for LMDS."¹⁸ Additionally, the Commission surmised that the LMDS technology could be developed "to suit some of these incumbent services."¹⁹ As a result of its careful consideration of all of these factors, along with the myriad of public interest benefits of LMDS, the

¹⁵ Sierra Digital Petition, p. 9.

¹⁶ *Second Report & Order*, ¶101.

¹⁷ *Id.*, ¶99 (*emphasis added*).

¹⁸ *Id.*, ¶98.

¹⁹ *Id.*, ¶99.

Commission reasoned that “on balance, we find the benefits of allowing expansion of incumbent licensees are outweighed by the harms to LMDS licensees of any future growth of existing 31 GHz services.”²⁰

II. Sierra Digital’s Claim That LMDS Received “More Than 1 GHz” Ignores The Realities of the Commission’s LMDS Licensing Scheme

In support of its contention that the Commission should abandon its compromise band plan, Sierra Digital struggles to create the bogus issue that LMDS somehow received more spectrum than warranted; in fact, Sierra Digital’s Petition reaches new heights of hyperbole in characterizing the final 28/31 GHz band plan as an LMDS “gold rush.”²¹ Admitting that it only participated in the LMDS Rulemaking following the July 1996 *First Report and Order and Fourth NPRM*, Sierra Digital’s comments ignore the realities of the entire four and one-half year LMDS Rulemaking record that led to the Commission’s ultimate and reasoned adoption of its two-licensee scheme. A review of that protracted record shows that initially the Commission proposed an allocation of 2,000 MHz of contiguous and unencumbered spectrum for two LMDS licenses per service area.²² However, after a prolonged allocation dispute between the satellite and LMDS industries, the Commission

²⁰ *Id.* For the same sound reasons, CVUS opposes Sierra Digital’s alternative request to reinstate all pending applications filed between the release date of the *Fourth NPRM* and the *Second Report & Order*. Sierra Digital Petition, p. 15-18.

²¹ Sierra Digital Petition, p. 5.

²² *First NPRM*, 8 FCC Rcd 560.

substantially reduced the LMDS allocation. Thus, while maintaining its dual licensing approach, the Commission's two LMDS licensees per BTA were allocated far less spectrum than originally proposed. The larger LMDS license has been reduced to a non-contiguous and partially encumbered 1,150 MHz license (spread out over almost 4 GHz of spectrum). Additionally, the second LMDS license now consists of a mere 150 MHz, fragmented in two parts with restrictions in those areas where protected point-to-point incumbents exist. Accordingly, Sierra Digital's suggestion that LMDS received more spectrum than required is simply wrong as it ignores the fact that no single LMDS license has been allocated more than 1,000 MHz of unencumbered spectrum.²³

Rather, consistent with the unrefuted need in the ample LMDS Rulemaking record for 1 GHz of unencumbered spectrum for a single licensee, the Commission coupled the 150 MHz from the 31.075-31.225 with the encumbered LMDS spectrum at 28 GHz "to compensate for the use restrictions imposed on 150 MHz in the 28 GHz that will be licensed to both LMDS and satellite services on a co-primary basis."²⁴ As part of its 31 GHz band sharing plan, the Commission also assigned spectrum for a smaller 150 MHz license for LMDS. Ironically, despite Sierra Digital's obvious disappointment with this decision, the Commission allocated spectrum for a smaller license in part "to accommodate more easily the ability of incumbent governmental

²³ Sierra Digital Petition, pp. 5-6, 15.

²⁴ *Id.*, ¶127.

and private business licensees to continue their existing operations in that spectrum segment on a protected basis..."²⁵

It is also noteworthy that due to the Commission's flexible LMDS service rules, the *Second Report & Order* also affords future point-to-point users the *opportunity* to acquire a 150 MHz license to provide their services.²⁶ Whether or not potential future point-to-point entities, be they governmental or commercial entities, can afford the cost of the 150 MHz license, or can commit the necessary funds "within the time constraints of an auction" as Sierra Digital muses, should be irrelevant to the Commission's consideration of the public interest factors relating to the potential future point-to-point service offerings in the 31 GHz band. Just like the Nevada Department of Transportation or any other potential point-to-point service provider, any potential LMDS small business bidder faces the same challenges of attracting financing, possibly forming a bidding consortium, and ultimately facing the marketplace uncertainties of an FCC spectrum auction.²⁷

²⁵ *Id.*, ¶129.

²⁶ Sierra Digital Petition, p. 12-13.

²⁷ In fact, CVUS filed its own *Petition for Partial Reconsideration* of the Commission's proposed financing plan to assist in providing small businesses with a realistic opportunity to participate as licensees. CVUS *Petition for Partial Reconsideration*, CC Docket 92-297, filed May 29, 1997.

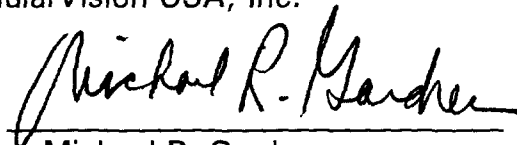
III. Conclusion

The Commission's compromise 31 GHz band plan reflects a well-reasoned approach to spectrum sharing which allows the multi-faceted LMDS technology to become a competitive national voice, video, and data alternative while accommodating existing point-to-point users who previously enjoyed only non-protected use of the 31 GHz spectrum. A review of the Commission's comprehensive record in the LMDS Rulemaking confirms that all relevant public interest factors were carefully considered as the Commission completed its thorough balancing test on the most beneficial and efficient spectrum sharing plans for both the 28 and 31 GHz bands. Accordingly, the Commission should deny Sierra Digital's Petition requesting the Commission to abandon the 31 GHz band plan compromise.

Respectfully submitted,

CellularVision USA, Inc.

By:



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June 4, 1997

Certificate of Service

I, Michael C. Gerdes, hereby certify that copies of the foregoing, "Opposition of CellularVision USA, Inc. to Petition for Partial Reconsideration Filed by Sierra Digital Communications, Inc." were delivered by hand, on June 4, 1997, to the following:

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